



ENVIRONMENTAL PROTECTION AGENCY

[FRL –9628-4]

6560-50-P

Notice of a Project Waiver of the Buy American Requirement of the American Recovery and Reinvestment Act of 2009 (ARRA) to the City of Austin, Texas.

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Regional Administrator of EPA Region 6 is hereby granting a project waiver of the Buy American requirements of ARRA Section 1605 under the authority of Section 1605(b)(2) [manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality] to the City of Austin (“the City”) for the purchase of ten (10) vertical linear motion mixers for the Clean Water State Revolving Fund (CWSRF) Hornsby Bend Biosolids Management Plant (BMP) Digester Improvement and Sustainability Project. The required vertical linear motion mixers are manufactured by foreign manufacturers and no United States manufacturer produces an alternative that meets the City’s technical specifications. This is a project specific waiver and only applies to the use of the specified product for the ARRA funded project being proposed. Any other ARRA project that may wish to use the same product must apply for a separate waiver based on the specific project circumstances. The Regional Administrator is making this determination based on the review and recommendations of the EPA Region 6, Water Quality Protection Division. The City has provided sufficient documentation to support its request.

The Assistant Administrator of the EPA’s Office of Administration and Resources Management has concurred on this decision to make an exception to Section 1605 of ARRA. This action

permits the purchase of the selected vertical linear motion mixers not manufactured in America, for the proposed project being implemented by the City.

EFFECTIVE DATE: January 12, 2012

FOR FURTHER INFORMATION CONTACT: Nasim Jahan, Buy American Coordinator, (214) 665-7522, SRF & Projects Section, Water Quality Protection Division, U.S. EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733.

SUPPLEMENTARY INFORMATION:

In accordance with ARRA Section 1605(c) and 1605(b)(2), EPA hereby provides notice that it is granting a project waiver of the requirements of Section 1605(a) of Public Law 111-5, Buy American requirements, to the City for the acquisition of selected vertical linear motion mixers. The City has been unable to find American made vertical linear motion mixers to meet its specific wastewater requirements.

Section 1605 of ARRA requires that none of the appropriated funds may be used for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States unless a waiver is provided to the recipient by EPA. A waiver may be provided if EPA determines that: 1) applying these requirements would be inconsistent with public interest; 2) iron, steel, and the relevant manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or 3) inclusion of iron, steel, and the relevant manufactured goods produced in the United States will increase the cost of the overall project by more than 25 percent.

The City has noted that out of the ten (10) vertical linear motion mixers, two 10 horse power (hp) mixers are required for the flow equalization tanks, four 20 hp mixers for the thickened sludge tanks, and four 15 hp mixers for the anaerobic digesters. The City specified the linear mixers because of their cam-scotch-yoke mechanism and superior energy efficiency. The linear mixers are a proprietary technology and are only manufactured by Enersave, a Canadian manufacturer. The City has provided information to the EPA demonstrating that there are no Vertical linear motion mixers manufactured in the United States in sufficient and reasonable quantity and of a satisfactory quality to meet the required technical specification.

Based on additional research conducted by EPA Region 6 there do not appear to be any American-made vertical linear motion mixers that would meet the City's technical specifications. EPA's national contractor prepared a technical assessment report based on the waiver request submittal, which confirmed the waiver applicant's claim that there are no American-made vertical linear motion mixers available for use in the proposed waste water treatment system.

EPA has also evaluated the City's request to determine if its submission is considered late or if it could be considered timely, as per the OMB regulation at 2 CFR §176.120. EPA will generally regard waiver requests with respect to components that were specified in the bid solicitation or in a general/primary construction contract as "late" if submitted after the contract date. However, EPA could also determine that a request be evaluated as timely, though made after the date that the contract was signed, if the need for a waiver was not reasonably foreseeable. If the need for a waiver *is* reasonably foreseeable, then EPA could still apply discretion in these late cases as per the OMB Guidance, which says "the award official *may* deny the request." For those waiver requests that do not have a reasonably unforeseeable basis for lateness, but for which the waiver

basis is valid and there is no apparent gain by the ARRA recipient or loss on behalf of the government, then EPA will still consider granting a waiver.

In this case, the waiver request was submitted after the contract date because of a delay in the process of the LM™ Mixer technology being purchased by the City's supplier, Ovivo USA, LLC ("Ovivo"), f/k/a Eimco Water Technologies, from Enersave (the inventor), in order to obtain control of all technical drawings and manufacture the mixers in the United States. The vertical linear motion mixers have recently been patented by Enersave and Ovivo has purchased only the rights to use the technology in the municipal market in North America. Ovivo has been working with Enersave to allow the complete transfer of information to take place; however, the duration has taken longer than anticipated as the provided information has been found incomplete requiring detailed support and fabrication from the inventor. All linear motion mixers have been fabricated by the inventor (Enersave) to date, due to the detailed technical drawings not being in the control of Ovivo. The initial schedule of events planned to allow Ovivo to do the fabrication for the Hornsby Bend mixers in the United States, however, the delay in getting the necessary information prevented this from occurring. When Ovivo found that the schedule would not allow fabrication to occur in the United States the waiver was requested. In light of the unexpected delay in the purchase of the LM™ Mixer technology, EPA believes that the need for a waiver was not reasonably foreseeable and thus will treat the City's waiver request as if timely submitted.

The April 28, 2009, EPA HQ Memorandum, Implementation of Buy American provisions of P.L. 111-5, the "American Recovery and Reinvestment Act of 2009," defines reasonably available quantity as "the quantity of iron, steel, or relevant manufactured good is available or will be available at the time needed and place needed, and in the proper form or specification as

specified in the project plans and design.” The City has incorporated specific technical design requirements for installation of vertical linear motion mixers at its wastewater treatment plant.

The purpose of the ARRA is to stimulate economic recovery in part by funding current infrastructure construction, not to delay projects that are “shovel ready” by requiring utilities, such as the City, to revise their standards and specifications, institute a new bidding process, and potentially choose a more costly, less efficient project. The imposition of ARRA Buy American requirements on such projects otherwise eligible for State Revolving Fund assistance would result in unreasonable delay and thus displace the “shovel ready” status for this project. To further delay construction is in direct conflict with a fundamental economic purpose of the ARRA, which is to create or retain jobs.

The Region 6 Water Quality Protection Division has reviewed this waiver request, and has determined that the supporting documentation provided by the City is sufficient to meet the criteria listed under ARRA, Section 1605(b), Office of Management and Budget (OMB) regulations at 2 CFR §§ 176.60 – 176.170, and in the April 28, 2009, memorandum, “Implementation of Buy American provisions of P.L. 111-5, the American Recovery and Reinvestment Act of 2009.” The basis for this project waiver is the authorization provided in ARRA, Section 1605(b)(2). Due to the lack of production of this product in the United States in sufficient and reasonably available quantities and of a satisfactory quality in order to meet the City’s technical specifications, a waiver from the Buy American requirement is justified.

EPA headquarters’ March 31, 2009 Delegation of Authority Memorandum provided Regional Administrators with the authority to issue exceptions to Section 1605 of ARRA within the geographic boundaries of their respective regions and with respect to requests by individual grant

recipients. Having established both a proper basis to specify the particular goods required for this project, and that these manufactured goods are not available from a producer in the United States, the City is hereby granted a waiver from the Buy American requirements of ARRA, Section 1605(a) of Public Law 111-5 for the purchase of the selected 10 vertical linear motion mixers, using ARRA funds, as specified in the City's request. This supplementary information constitutes the detailed written justification required by ARRA, Section 1605(c), for waivers "based on a finding under subsection (b)."

Authority: P.L. 111-5, section 1605.

Issued on:

Dated: January 12, 2012

Signed: Al Armendariz, Regional Administrator
U.S. Environmental Protection Agency, Region 6

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